

Section 2 of the Excise Act, 1961, states:

"Intoxicating liquor means any liquor of any description containing more than 2 per centum of proof spirit which is fit or intended to be or can by any means be converted for use as a beverage but does not include toddy".

The section contains two essential elements, namely, the liquor must contain more than 2 per cent. of proof spirit, and secondly it must be fit or intended to be or can by any means be converted for use as a beverage but does not include toddy. The learned magistrate was of the opinion that the chemist's report had established the first element but not the second. He relied on the Singapore case of *Deputy Public Prosecutor v. Tan Ah Guat*.⁽¹⁾ The case was shortly reported. In that case the court held that the second element of that particular section (in *pari materia* with our section) had not been established, and observed that it was highly desirable, even though not strictly necessary, that the wording of the section should be followed. That is all we know about that case. The contents of the chemist's report were not reproduced in the judgment and therefore it is not possible to judge what it contained, and in that respect that case can be distinguished from the present case. In the present case the chemist stated *inter alia*, and I quote:

"I analysed the contents of the above-mentioned exhibits and found them to be 'intoxicating liquor' as defined in section 2 of the Excise Act, 1961".

She then went on to state the analytical data as she found them. Counsel for the respondent submitted that when the chemist had included the analytical data in her certificate she was not aware that section 2 of the Act requires both the elements to be proved. I cannot accept that proposition. A passage in the chemist's report, to wit, that she found the contents of the exhibits to be intoxicating liquor as defined in section 2 of the Act is sufficient to say that she had directed her mind to the requisites of the provisions of the section. Again, counsel for the respondent said that although the certificate is admissible it is not conclusive evidence that what the certificate purports to show is that the substance is intoxicating liquor. On the other hand, the learned deputy public prosecutor has directed my mind to the case of *Toh Kim Soo v. Regina*.⁽²⁾ In that case the prosecution had to prove *inter alia* that the substance contained a certain percentage of pure alcohol by weight. However, the chemist's certificate did not say how much pure alcohol by weight there was in the contents but merely the percentage of proof spirit. The appellate judge in that case was of the opinion that the certificate was sufficient although it would have been more satisfactory if it had followed the wording of the section. The learned deputy public prosecutor has asked me to apply

A the observations of that case to the present case.

I observe that a principle to be gleaned from the two cases is that although it is highly desirable to follow the wording of the section in the certificate, failure to do so is not fatal to the prosecution case. In my view, as long as there is sufficient indication in the chemist's report to show that the chemist had directed her mind to the requisites of the section, omission to state anything like detail will not be a criterion; her expression of opinion that the substance is intoxicating liquor within the meaning of section 2 must be a rational one and drawn from adequate data. In the present case the chemist has given the analytical data as required under the first element of the section, but she did not in so many words indicate in her certificate the second element as required under the section. However, she has directed her mind to the requisites of the section and is of the opinion that the substance was intoxicating liquor within the meaning of that section. To my mind that is sufficient although it would have been more desirable if she had in so many words followed the exact wording of the second limb of section 2.

In the circumstances I am satisfied that the prosecution had proved a *prima facie* case. I will therefore allow the appeal and order the learned magistrate to call for the defence.

Appeal allowed.

Solicitors: B. Kaher Singh & Co.

YONG MOK HIN v. UNITED MALAY STATES SUGAR INDUSTRIES LTD.

[O.C.J. (Raja Azlan Shah J.) June 22, 1966]

[K.L. — Civil Suit No. 1319 of 1964]

Contract — Building contract — Payment by instalments — Whether contract an entire contract — Non-completion of work — Non-payment of instalment — Breach of contract — Measure of damages — Equitable set-off.

The plaintiff, a building contractor, claimed various sums in respect of a progress payment on a building contract and building materials supplied. The defendant company in their defence pleaded that the work was done under a contract, that the work was not completed on the agreed date and that the plaintiff had abandoned the work and they therefore counterclaimed for damages for breach of contract.

Held: (1) the contract in this case was not an entire contract and the plaintiff was therefore entitled to payment for work completed by him;

(2) the plaintiff was not entitled to treat the contract as repudiated for mere non-payment of the instalment and that in the circumstances, the plaintiff had repudiated the contract by abandoning it;

(3) as the defendant company had opted to accept repudiation and sue for damages for incomplete and defective work the measure of damages would be the difference between the reasonable costs of completing the works

as varied and the amount that would have been due to the plaintiff had he completed the work as varied.

Cases referred to:—

- (1) *Thorn v. London Corporation* (1876), 1 App. Cas. 120 at p. 127.
- (2) *Appelby v. Myers* (1867), L.R. 2 C.P. 651 at p. 659-660.
- (3) *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1884), 9 App. Cas. 434.
- (4) *Withers v. Reynolds* (1831), 1 L.J.K.B. 30.
- (5) *Freeth v. Burr* (1874), L.R. 9 C.P. 208.
- (6) *Heyman v. Durwins* [1942] A.C. 356.
- (7) *Hadley v. Baxendale* (1854), 9 Ex. 341.
- (8) *Hirt v. Hahn* (1876), 61 Missouri 496.
- (9) *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526 at p. 535.
- (10) *Milwaukee City v. Shaler* (1898), 84 Fed. Rep. 106.
- (11) *Hick v. Raymond and Reid* [1893] A.C. 32.
- (12) *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q.B.D. 670.
- (13) *Hanak v. Green* [1958] 2 W.L.R. 755.

CIVIL SUIT.

Dato' R. P. S. Rajasooria for the plaintiff.

Ronald Khoo for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: The plaintiff is a building contractor carrying on business under the name of Yong Mok Hin Construction, Kuala Lumpur. The defendants are a limited company hereinafter referred to as the defendant company. The plaintiff claims \$13,800 representing materials used and damaged by the defendant company while erecting their machinery in the factory; \$40,785 for the alteration of the two original stores to three stores at \$13,595 each; \$36,000 as representing the fifth progress payment; and interest at 6 per cent. per annum from 24th December 1964 to date of realisation, and costs. Items (d), (e) and (f) have been abandoned.

The defendant company denied liability. They alleged that the work done must be taken to be work done under the contract, that is, for the contract price of \$187,500, and that the amount sued must be taken to be the balance due under the said contract. They further alleged that they never agreed or otherwise became liable to pay for the said work or any part thereof on the grounds following:

- (a) The said works were not done or completed by 8.2.1964 which was a condition precedent as time was of the essence of the contract.
- (b) The plaintiff had abandoned work in about November 1964.
- (c) The Government had not given a certificate of fitness of occupation.

- A (d) The work was defective and done in a non-workmanlike manner.

The defendant company counter-claimed for damages for breach of contract, expenses incurred or to be incurred to remedy defective work and complete the whole project and damages for delay and consequential loss.

- B The circumstances giving rise to the claim are as follows. On 8th August 1963 the plaintiff entered into a contract with the defendant company for the construction of a one-storey office building for \$82,500 and two zinc wall stores for \$105,000. The contract (Exh. P1) *inter alia* stipulates that time was of the essence and that the time for completion of the whole project was six months from the above date. It was accepted by both parties that advances on the contract price were to be made towards the progress of construction on the certification by the architect and the balance on a certificate of fitness of occupation being granted to the defendant company by the Government. The plaintiff was responsible for the performance of the work under the direct supervision of the defendant's architect. There was a schedule of works and a plan (Exh. P22) but no specification was provided. It is a lamentable fact that the said work, which in reality was not precisely defined and planned, was put out to tender by the defendant company or their architect without using a schedule form of contract, thus relying on their powers to vary the work and issue working drawings for the supply of the actual design during the currency of the work, when they would be far better off to recognise the reality and use a schedule form of contract thereby avoiding the probability of large claims of uncertain amounts by both sides. That is my observation on the evidence. To proceed with the case, it was the understanding of both parties that on each occasion when progress payment was to be made, the defendant company would issue to the plaintiff shares for that amount. At the time of the execution of the agreement the plaintiff agreed and was allotted a total of \$150,000 worth of shares in the defendant company (Exh. D11). In due course the plaintiff commenced work and he received in all four progress payments the last of which was on 6th May 1964. On that date he had received in respect of progress payments a sum of \$34,500 in cash and \$130,000 worth of shares, making a total of \$164,500.

- I I shall now proceed to consider the plaintiff's claim. With regard to his first claim, the plaintiff testified that the defendant company had used his timbers which were already on the site in connection with the erection of their machinery and therefore had incurred loss in the region of \$2,600. That has not been challenged.

He also testified that the defendant company intended to construct a third store and in order to do so he had to do some levelling of the ground which he estimated would cost him \$11,200. To my mind, the second limb of his claim under this item is in actual fact a variation in the sense that on a true construction of the contract it is not included in the contract price. The contract work was, to my mind, so greatly altered that the work actually done cannot be regarded as done under it at all. Lord Cairns said in *Thorn v. London Corporation*:⁽¹⁾

"If it is the kind of additional work contemplated by the contract, the contractor must be paid for it and will be paid for it according to the prices regulated by the contract If the additional or varied work is so peculiar, so unexpected and so different from what any person reckoned or calculated upon, it may not be within the contract at all, and he could either refuse to go on or claim to be paid a quantum meruit".

The plaintiff commenced work on the third store after the managing director (PW.2) had authorised it to be carried out at the price quoted by the plaintiff — vide Exh. P5. The defendant company led no evidence to rebut the plaintiff's claim. In the circumstances I am satisfied that the plaintiff's claim under this item has been substantiated.

With regard to the plaintiff's claim under the second item, that is, with regard to the alteration of zinc walls to 9" brick walls, in about December 1963 and January 1964, that is during the progress of the work, there was a proposal to alter the original plan to the effect that the two stores had to be replaced by three stores and that the original zinc walls were to be replaced by 4½" brick walls. In pursuance of that proposal the plaintiff wrote to the defendant company and gave his quotation (Exh. P2 dated 6th December 1963).

"Regarding to the construction of two additional stores according to the old plan at the lowest price @ \$86,000 this is also agreed by you and according to managing director and vice chairman Mr. Tan Hian Tsin instruction for the demolition of the originally zinc wall stores and re-construction of brick wall store, I submit herewith my quotation for your approval as below:

(a) Originally hard wood poles, replaced of 6" x 6" R.C. concrete poles approx. = 55 pes.	\$ 1,375.00
(b) Originally zinc wall, replaced of 4½" brick wall — approx. 2,000 cu. ft.	10,000.00
(c) Plaster works approx. of 2,500 cu. ft.	7,500.00
(d) Extra 9" x 6" stones approx. 150 cu. ft.	2,700.00
	\$21,575.00
Less originally zinc wall	7,980.00
	\$13,595.00

I hope this quotation will meet with your kind approval, and if any further alteration amendment other than the above, shall be discuss in detail.

Yours faithfully,
Yong Mok Hin.

A We accepted.

(Sgd.) Thian Seu Ling.
Managing Director.
United Malay States Sugar
Industries Limited."

B That price was in respect of one store The work was authorised by the managing director (PW.2). On 2nd January 1964 the architect wrote to the plaintiff as follows:

"This is to inform you that the 4½" brick wall constructed for the store to be pulled down immediately and reconstruct it with 9" brick wall with strong cement mortar".

C There was a plan for the variation in the form of Exh. P8 which was signed by two directors of the company and their secretaries. The plaintiff had carried out 90 per cent. of the work under the supervision of the architect. Door frames, iron doors, roof and tiles had yet to be completed although they were at the site.

D The defendant company contended that the sum claimed was not due because the plaintiff had failed to perform or carry out the said alterations. I must remind myself that this particular claim was in connection with the erection of a 9" brick wall only. The architect testified that the plaintiff had put up the zinc walls in respect of store A according to the plan. He had then demolished that wall and had put up the 4½" brick walls. This is confirmed by the evidence of DW.3. PW.2, the managing director, testified that he had seen and checked the work with regard to Exh. P7 and was satisfied that the work was carried out and agreed that the plaintiff would be entitled three times \$13,595. Between the two, I would prefer the evidence of the architect who, to my mind, would be the best person to testify on the matter. In the circumstances I will allow the full amount of \$13,595 for store A, but in respect of stores B and C I will allow the amount specified for the zinc wall, that is, \$7,980 each, making a total of \$15,960. Therefore, under this item the plaintiff is entitled to a sum of \$29,555.

H With regard the plaintiff's third claim, he alleged that when he demanded for his fifth progress payment the architect refused to put up his certificate in view of the plaintiff's letter dated 6th May 1964 (Exh. P3) which reads as follows:

I "I, Yong Mok Hin, I/C 2179101, have agreed with the administrator of United Malay States Sugar Industries Limited Raja Nong Chik bin Raja Ishak and the chief engineer Mr. Li Ching Yee that I will not receive any more progress payment after the fourth progress payment has been paid amounting to \$36,000 (thirty six thousand only) and the balance of the payment to be made to me after the completion of the whole work as stated above".

The plaintiff then went to Ipoh and saw the chairman of the defendant company, Dato' Lau Pak Kwan, who gave the authorisation to pay.

On returning to Kuala Lumpur the plaintiff saw the architect and told him that he had the necessary authorisation to be paid. The architect asked his assistant to verify, and that was confirmed. Accordingly, the architect prepared the certificate (Exh. P2 dated 24th July 1964). The architect certified the cost of the work on the office building at \$70,000, and in respect of the three stores at \$145,000. After deducting 10 per cent. for retention fund and debiting the plaintiff with \$164,500 as detailed above, he certified that the amount due to the plaintiff was \$36,000.

The question to be posed is whether the plaintiff is entitled to that sum of money. That, to my mind, depends on the question whether the contract is an entire contract, and that in its turn depends on its construction in the light of all the circumstances. It is settled law that in an entire contract complete performance by one party is a condition precedent to the liability of the other; in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party: see Vol. I *Chitty on Contracts*, 22nd ed. at p. 458. Vol. 8 *Halsbury's Laws of England*, 3rd ed. at p. 166. To my mind, the present case is not an entire or lump sum contract. The contract (Exh. P1) gives an express right to payment by advances on account of the contract price as the work proceeds, and so the question of an entire contract does not arise. No doubt the rule as to entire contract may still apply to the last instalment or to any individual instalment if the work is abandoned before the instalment is completely earned. This envisages a type of contract under which the consideration is apportionable and accrues due as the work proceeds so that at any time the contractor can claim on a *quantum meruit* for what he had done. Thus Blackburn J. said in *Appelby v. Myers*:⁽²⁾

"Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work".

In cases where the ascertainment of the instalment depends upon the certificate of the architect, such terms will create a debt due in respect of each instalment: see 9th edition of *Hudson's "Building and Engineering Contracts"*, p. 430. Where the contractor has become entitled to an instalment, he will not normally forfeit his right to such payment by a subsequent abandonment or repudiation of the contract, but will be entitled to sue for any unpaid instalment, subject of course to the employer's right to

A counter-claim for damages for breach of contract. In my view, Exh. P2 is a debt due to the plaintiff. It was said that the plaintiff could not claim payment because he had signed Exh. P3. I cannot accede to that proposition for two reasons. In the first place, there is evidence that the plaintiff was paid \$34,500 cash in respect of one progress payment. In the second place, the defendant company's chairman had authorised payment in respect of the fifth progress payment and consequently Exh. P2 was issued by the architect. These facts lend colour to the probability that the parties by their conduct had altered their original positions with regard to payment of subsequent instalments. As this amounts to a waiver by the defendant company of their right under the contract, they are estopped from relying on Exh. P3 to prevent payment. The work was well earned before abandonment, and in the circumstances the plaintiff's claim under this head must succeed.

D The plaintiff also claimed interest at 6 per cent. per annum from 24th December 1964 to date of realisation. I allow this claim under section 11 of the Civil Law Ordinance, 1956.

E The counter-claim falls under three heads; damages for breach of contract, expenses incurred or to be incurred to remedy defective work and complete the whole project, and damages for delay and loss of use of the premises.

F I shall deal with the first two claims together. There is clear evidence which substantiates the defendant company's claim that the plaintiff abandoned work in November 1964. The plaintiff admitted that he did not complete the work on the due date but argued that it was the fault of the defendant company in refusing to pay him the fifth progress payment and therefore he contended that it was the defendant company who had repudiated the contract. In my judgment that is not a good defence. The general principle with regard to the sale of goods can by analogy be applied to the present case. *Hudson* at page 244 states:

G "The tendency has been to hold that mere non-payment of an instalment due in respect of goods does not constitute a repudiation, *Mersey Steel & Iron Co. v. Naylor Benzon & Co.*⁽³⁾ while a general refusal to pay instalments on the due date will do so, *Withers v. Reynolds.*"⁽⁴⁾

H In the former case, the Earl of Selborne at pages 348-349 remarked:

I "I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr*⁽⁵⁾ which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing

his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here".

Looking at the conduct of the defendant company, I am of the view that by refusing to pay for the fifth progress payment they did not intend to repudiate the contract. That is evidenced by their letter dated 8th May 1964 (Exh. D20) to the plaintiff that "the company intends to use the office building before the middle of June 1964. Will you please complete the work". Having considered this aspect of the case I am satisfied that it was the plaintiff who repudiated the contract by abandoning the work.

The exact nature of the right to treat a contract as repudiated gives the defendant company an option to accept the repudiation and sue for damages or to treat the contract as subsisting and ask for specific performance. A similar situation was considered by the House of Lords in *Heyman v. Darwins*.⁽⁶⁾ It was there stated that, just as in the case of anticipatory breach, in the case of a breach while the contract was partly performed, a party could either accept the repudiation and sue for damages, or could treat the contract as subsisting and continue to call for performance. Acceptance of the repudiation only means that the party doing so is relieved of his obligation to perform it any further. It does not bring the contract to an end in any theoretical sense, and provisions in the contract — for instance regulating the state of accounts between the parties, controlling damages, or providing for the handling of disputes by arbitration or otherwise — continue to have effect.

In respect of defective work alleged by the defendant company, the architect has testified that in September 1964 he inspected the work and gave his opinion as follows (Exh. D23):

"Office Building.

This is no sign of bad workmanship or inferior materials used, generally the structure is perfect in every respect except slight crack on the plaster of some roof beams. As these cracks are very fine and on the underside of the beams, penetration of crack is at the plaster surfaces and these will not affect the strength of the main structure".

With regard to the three stores his opinion was as follows:

"Godown.

This building is in a very bad state as cracks are along the brick wall vertically from top to the base. This is due to sinking of the foundation which was built on newly filled ground. Underpinning is required to spread and strengthen the foundation is recommended".

DW.3, a civil and structural engineer, who inspected the work at the end of the same year also testified about the defective work as enumerated in para. 7 of the statement of defence. The plaintiff sought to argue that the architect had supervised the work and had issued

A the certificate Exh. P2, had signed in the plaintiff's pass book, and lastly the defendant company had by their letter stated that the work was satisfactory. In my judgment such certificate or letter only represents the approximate value of the work done or materials used. It is not conclusive on the parties as an expression of satisfaction with the quality of the work or materials. That is subject to readjustment upon the issue of the final certificate. Having considered the evidence, I am satisfied that the work was defective and was due to bad workmanship.

C The defendant company opted to accept repudiation and sue for damages for incomplete and defective work. The law with regard to the measure of damages is adequately stated at page 442 of the 9th edition of *Hudson* on "Building and Engineering Contracts".

D "... the direct measure of damage will be the difference between the reasonable cost to the employer of repairing the defects or completing the work, together with any sums paid by or due from him under the contract, and the sums which would have been payable by him under the contract if it had been properly carried out. (Where the former does not exceed the latter, only nominal damages would be recoverable). Such damages are clearly recoverable within the first branch of the rule in *Hadley v. Baxendale* ⁽⁷⁾ as likely to arise in the usual course of things from the breach".

E The editor cited several authorities and I think it would be sufficient if I only cite the case of *Hirt v. Hahn*.⁽⁸⁾

F "B agreed to erect a house for the plaintiff according to plans by a certain day. The defendants were B's sureties. After partly completing, B ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable to B by the plaintiff had B completed the house at the time agreed by the terms of his contract".

G That is an American case but the principle enunciated was approved by the Court of Appeal in *Mertens v. Home Freeholds Co.*⁽⁹⁾ where Lord Sterndale said:

H "It is true that that is an American case. Though I cannot put my finger on them for the moment I feel satisfied that there are English cases which fix the same measure of damages. At any rate for the purpose of this case it is sufficient to say we all consider that the proper measures of damages for the breach of a building contract such as this".

I However, the cost of completion means the cost of completing the contract work, but not different work. Thus in *Milwaukee City v. Shailer*,⁽¹⁰⁾ another American case, Shailer contracted to construct a tunnel for the city. The contract provided that in case of default, the city should be entitled to complete the work at Shailer's expense. On Shailer's default the city constructed a tunnel which was essentially different in plan and cost of construction from that

contemplated by the contract. It was held that the city was not entitled to recover damages from Shailer.

Mr. McDonald, a quantity surveyor, testified that a total sum of \$377,221.92 would be the cost of remedying defective work and completing the project from where the plaintiff had left it. He based his valuation on the current and appropriate building rates for this quality of work pertaining to this part of Malaysia. It must be borne in mind that the original contract price was \$187,500, and the figure quoted by DW.6 would therefore include the cost for the variation and remedying defective work. The cost of putting right defective work, he stated, was \$21,095.75. Therefore, arithmetically, \$168,720 would be the cost of the extra work. In this connection the cost of extra work must be considered in the light of all the surrounding circumstances. Thus an employer may have deliberately chosen a small-time contractor with limited resources of capital, plant and labour to do the work in the hope of getting a cheaper job. The plaintiff is a class 'E' P.W.D. contractor with a ceiling of \$50,000. As no fixed amount was agreed upon in respect of extra work, and considering that work was to be done by a contractor of the same class as the plaintiff, and in view of the principle enunciated in *Milwaukee City v. Shailer*, *supra*, I would consider a sum of \$126,540 (75 per cent. of \$168,720) as reasonable. In the circumstances, the amount that would cost the defendant company to complete the work and remedy defects would be \$335,135.75.

As against that amount must be deducted the contract price as varied that would represent the costs which the plaintiff would have expended on the whole project as varied. I assess that figure in the following manner:

Original contract price	\$187,500.00
Extra work	74,000.00
	<u>\$261,500.00</u>

(\$74,000 is made up of \$24,000, the cost of alteration from zinc walls to 9" brick walls; \$40,000 for a third store; and \$10,000 for labour and miscellaneous expenses). From the amount of \$261,500 must be deducted the sum of \$36,000 as representing the fifth progress payment. Therefore the amount which would be due to the plaintiff would be \$225,500.

The measure of damages would be the difference between the reasonable costs of completing the work as varied and the amount that would have been due to the plaintiff had he completed the work as varied, and that is \$109,635.75.

A I now proceed to consider the counter-claim in respect of damages for delay and consequential loss.

B Under the contract time was of the essence and the work was to be completed by 8th February 1964. However, the original plan, Exh. P22, was altered to accommodate three stores instead of two stores, and the zinc walls were to be altered to 4½" brick walls and ultimately to 9" brick walls. As I have stated earlier, the extra work was so substantially altered that it cannot be regarded to be done under the contract. In the circumstances of the case the plaintiff cannot reasonably be expected to perform the whole project as required within the stipulated time in view of the new situation. To my mind, the specified time under the contract has ceased to be applicable. This is a question of fact which depends upon the circumstances which might be expected to affect the progress of the work. Be that as it may, where the specified time has ceased to be applicable and the contract is silent as to time there is an obligation on the part of the plaintiff to complete the work as altered within a reasonable time. As Lord Watson said in *Hick v. Raymond & Reid*: ⁽¹¹⁾

E "When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea'.

F What is a reasonable time depends on the circumstances of the particular case. Where a contract was to be performed "within a reasonable time" the Court of Appeal in *Hydraulic Engineering Co. v. McHaffie* ⁽¹²⁾ held that:

G "The reasonableness was to be measured, not by the particular existing staff and appliances of the contractor's business, but by the time which a reasonable diligent manufacturer of the same class as the contractor would take to carry out the contract".

Lord Watson when dealing with "what is a reasonable time" said in *Hick v. Raymond & Reid*, *supra*, that it

H "... has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably".

I Considering the present case, I am of the view that the plaintiff has failed to carry out the work as altered within a reasonable time. Damages for delay and consequential loss in the instant case are recoverable within the first branch of the rule in *Hadley v. Baxendale*, *supra*, as arising naturally and in the usual course of things from the breach. The natural and probable result of such breach is that they are prevented from using the premises as a factory on a reasonable date. No figures have been adduced to show the extent of their loss and,

giving the best consideration I can in the circumstances, I award a sum of \$10,000.

In the circumstances the defendant company is entitled to \$119,635.75 on their counter-claim. A sum of \$14,500 as representing the value of materials on the site must be deducted. That leaves a sum of \$105,135.75 in their favour. This is a set-off against the plaintiff's claim of \$79,355. Where the employer sets out a defence of an equitable set-off to a claim by the contractor for price of work done, the latter's claim will be treated as having failed if the amount to be set-off exceeds the amount claimed. *Hanak v. Green* ⁽¹⁸⁾ is authority for that proposition. Accordingly the plaintiff's claim is dismissed with costs. The defendant company's counter-claim is upheld. They are therefore entitled to a sum of \$25,780.75 and costs of the counter-claim.

*Plaintiff's claim dismissed.
Defendant's counter-claim
upheld.*

Solicitors: *Dato' R. P. S. Rajasooria & Son;
Shearn, Delamore & Co.*

**GWEE KIM BOCK v. SINGAPORE GLASS
MANUFACTURERS CO. LTD.**

[O.C.J. (Choor Singh J.) June 24, 1966]

[Singapore — Suit No. 626 of 1966]

*Practice and Procedure — Statement of claim —
Claim for damages for injuries received in a road acci-
dent — Particulars necessary.*

*Damages — Claim for — Statement — Particulars.
Negligence — Road accident — Particulars.*

The plaintiff had brought an action for damages for injuries received in a road accident and he alleged in his statement of claim that he on or about March 19, 1964, was at or near Ayer Rajah Road when he was run into and knocked down by a motor van SGA 4611 driven by the servant or agent of the defendant. The defendants applied by summons in chambers for an order that the plaintiff do file further and better particulars.

Held: when a plaintiff claims damages for injuries received in a road accident, he must, in his statement of claim, give sufficient particulars to enable the defendant, first to identify the accident in question and secondly to know what exactly is the case he has to answer. It is not sufficient to state merely the particulars of the defendant's negligence.

SUMMONS IN CHAMBERS.

T. G. Dunbar for the plaintiff.

J. Grimberg for the defendants.

Choor Singh J.: This was an application by the defendants made by way of summons-in-chambers for an order that the plaintiff do file further and better particulars of his claim.

The plaintiff in his statement of claim pleaded as follows:—

A "On or about the 19th day of March, 1964, the plaintiff was lawfully at or near Ayer Rajah Road in Singapore when he was run into and knocked down by motor-van SGA 4611 which was being driven by the servant or agent of the defendants and which was travelling along Ayer Rajah Road in the direction of Alexandra Road.

B The said collision was caused solely by the negligence of the servant or agent of the defendants.

Particulars of Negligence

- (a) Failing to keep any or any proper look out;
- (b) Driving at an excessive speed in the circumstances;
- (c) Failing to observe the presence of the plaintiff on the highway;
- C (d) Driving into the plaintiff;
- (e) Driving on to the wrong side of the road;
- (f) Failing to stop, swerve, slow down or otherwise avoid the said collision.

By reason of the aforesaid negligence the plaintiff has suffered injuries, has endured pain and has been put to loss and expense.

D The defendants, in their summons, prayed for an order

"That the plaintiff's solicitors do file further and better particulars of the statement of claim as follows:—

Under Paragraph 1

E Of the allegation that the plaintiff was lawfully at or near Ayer Rajah Road Singapore when he was run into and knocked down by motor van No. SGA 4611, stating precisely the plaintiff's position in relation to or upon Ayer Rajah Road when he was so run into and knocked down."

At the hearing of the summons, counsel for the defendants submitted that the statement of claim did not contain sufficient particulars of the scene of the accident upon which he could take the defendants' instructions, or sufficiently particularise the substantial issue before the court. Counsel for the plaintiff replied, that there was only one accident; that the defendants knew all about it and that the defendants were therefore
F not entitled to any further or better particulars.

The defendants not having filed their defence, it is not known whether or not they admit that their motor van was involved in the accident in question.

H In my opinion, when a plaintiff claims damages for injuries received in a road accident, he must, in his statement of claim, give sufficient particulars to enable the defendant, first, to identify the accident in question and, secondly, to know what exactly is the case he has to answer. It is not sufficient to state merely the particulars of the defendant's negligence. The plaintiff must give particulars of his own situation at the time of the accident and state the circumstances under which the defendant collided with him. Particulars of a defendant's negligence do not make any sense unless and until it is known where the plaintiff was and what he was doing at the time of the collision.
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